HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE

REPORT OF WORKING GROUP 2 ON LAND REFORM, REDISTRIBUTION, RESTITUTION AND SECURITY OF TENURE

ROUNDTABLE 4

"LAND RESTITUTION"

(Kempton Park, 7 October 2016)

1. INTRODUCTION

Roundtable 4 was held in Kempton Park on 7 October 2016, on the theme of land restitution. The Working Group was addressed by four invited experts who presented written papers on different aspects of the theme and then participated in subsequent discussion sessions. The presentations were as follows: **Ms Nomfundo Ntloko-Gobodo**, Chief Land Claims Commissioner who gave the Panel an ***Overview of the Restitution Programme: progress, achievements and policy constraints***; **Professor Peter Delius** of the History Department, Wits University on ***Historical Misconceptions and the Implementation of Land Restitution;*** **Ms Constance Mogale** (Alliance for Rural Democracy) **on** ***Analysis of CPAs as Land Owning Vehicles;*** and **Dr Nerhene Davis** on ***Inclusive Business Models in South African Land Restitution: ambiguity emerging.***

Presented below is a consolidated summary of the issues raised by the presenters, and which emerged during the discussions, arranged by sub-theme rather than by designated speaker. The summary is followed by a listing of the legislation (including draft legislation, and policy documents) referred to in the discussion. The report concludes with a collated list of conclusions and recommendations.

2. ISSUES RAISED

- Providing the background to the rest of the discussion, the report on the current state of land reform in South Africa painted a picture of formidable struggles to deliver on the mandate of section 25(7) of the Constitution to provide restitution or equitable redress to any "person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws". The law enacted to make this possible, according to the instructions of the Constitution, was the **Restitution of Land Rights Act 1994 (RLRA),** which established the **Commission on Restitution of Land Rights (CRLR)** and the **Land Claims Court (LCC).** The CRLR was tasked with soliciting, investigating and resolving land claims through negotiation and mediation, and if these strategies failed, the matter could be referred to the LCC for adjudication. By 31 March 2016 the claims settled numbered 78 750, involving

3 327 984 hectares acquired, and costing R33.4 billion. (Finalised claims were reported at 60 938, with outstanding ones at 7 419).

- Key challenges for the LCC include: a focus on reducing the number of cases before the court; managing direct access where cases are not ready for settlement but are referred to the court by interested parties; inactive and abandoned cases by third parties; complex claims with multiple rights and overlapping claims; absence of permanent judges. But probably the most significant of the challenges facing the Court are the implications of the LAMOSA judgement.

- Following the President signalling, during the 2013 State of the Nation Address, that government would consider re-opening the lodgement of land claims (and also explore exceptions to the 1913 cut-off date), the **Restitution of Land Rights Amendment Act 15 of 2014** was passed by the Fourth Parliament and signed into law on 30 June 2014. It provided for the re-opening of the lodgement of land claims for a further period of 5 years (1 July 2014-30 June 2019). Lodgement duly commenced on 1 July 2014. The Act was challenged in the Constitutional Court by the Land Access Movement of South Africa (LAMOSA), and judgement was handed down on 27 July 2016, declaring the Amendment Act invalid. Some of the implications of the judgement are as follows:

    - declaration of invalidity takes effect on 27 July 2016
    - CRLR is interdicted from processing claims lodged after 1 July 2014 until Parliament re-enacts an Act re-opening lodgement
    - CRLR may process these claims **if** all pre-1998 claims are finalised before the re-enactment
    - potential claimants who have not lodged by 27 July 2016 may no longer do so
    - new claims lodged before 27 July 2016 remain valid (ie, "pending new order claims")
    - Parliament has 2 years from date of judgement to re-enact lodgement legislation (ie, up to 27 July 2018), failing which the Chief Land Claims Commissioner is to approach the ConCourt for directions on how the Commission is to deal with pending new order claims
    - no clarity on the effect of competing claims lodged after 1 July 2016 on pending pre-1998 claims

- The CRLR faces many challenges and limitations across the board: in terms of strategy, structure, systems, style, staff and skills. It is currently focused on:

    - accelerating the settlement of remaining land claims submitted before the 1998 cut-off date;
    - codifying the exceptions to the 1923 cut-off date for descendants of the Khoi and the San, and identifying heritage sites and historical landmarks that fall with the exception;
    - implementing a programme to improve its operational effectiveness.

- Land reform policy has been plagued by historical misconceptions, and these have guided the implementation of policies as well. The most damaging of these misconceptions include the following:

    - that before dispossession, Africans lived in communities ruled by chiefs, on land they had lived on from time immemorial and the boundaries of this land were well established and static, and the land was 'owned' by the chief on behalf of the community
    - that communities were harmonious until dispossession, and dispossession was itself a liner process, where a "community" was dispossessed of land, which then passed on to white ownership

- There are many problems with this false historical understanding, which is blind to the following truths (to name but a few):

    - chiefs primarily exercised control over people, not land
    - identifiable and settled "tribes" are a colonial construction: in-and-out migration was common, borders were fluid and cultures were dynamic
    - the main locus of control and ownership of land was the homestead
    - the term "community" as currently used does not do justice to divisions and diversity, and many people did not experience dispossession as part of a community but as individual homesteads
    - the master narrative of land dispossession is thus profoundly flawed: it is oversimplified, and is therefore poor preparation for the complexities of restitution.

- Partly because of these fundamental misconceptions, and in part also because of bureaucratic inefficiencies, the evolution of the implementation of land restitution has been beset by problems:

    - scale and complexity of claims underestimated by policymakers
    - Commissions under-resourced, under-skilled, defective in record-keeping and archiving
    - to correct for the slow start in claims, NGOs, officials, chiefs and brokers drive acceleration of process by favouring large 'community' claims
    - moreover, Restitution becomes conflated with Redistribution
    - thousands of claims gazetted on the basis of inadequate research, the gazetting itself being represented as proof of thorough investigation; claims then settled administratively through negotiation
    - settlements reached irrespective of the validity of claims (e.g. Mala Mala!) with "willing sellers" a mix of insecure farmers and those attracted by the big money
    - officials merged individual and family claims with community claims into large overarching claims, sometimes creating new 'communities' in the process and

    seriously marginalising individual and family entitlements (in clear contravention of judgements of the LCC)
  - flood of contested claims reach the LCC where Commission's research was frequently found to be inadequate. Loose notion of 'community' challenged, as well as lumping together of separate claims into mega common claims. Delays and bottlenecks.
  - official hostility against cash settlements misguided in situation where delivery of land benefits is so slow and uncertain

- The Commission needs to recognise that many community claims are not going to survive scrutiny by the courts. The nature of a claim is determined at the time that it is lodged by the person lodging it. It cannot be changed. Where claims have been merged or artificial communities created, one needs to go back to the claim form to see on what basis the person lodging the claim made his or her claim. If it was lodged as an individual claim it must be treated as such. And if a community claim, it must be assessed as a community claim and if the alleged community does not comply with the definition of community, then in terms of the ***Kusile*** decision of the Land Claims Court it is treated as a set of individual claims if the person lodging the claim intended to benefit the persons making up what he or she wrongly considered to constitute a community.

- Another aspect of restitution policy worth raising is the issue of "strategic partnerships" between land reform beneficiaries and the commercial farming sector. Noting the 'spectacular failure' of attempts to transfer land directly to beneficiaries at the time, the then Minister of Land Affairs, Thoko Didiza, called for these partnerships, in what signalled an important shift in policy from **access** towards **maintaining agricultural productivity**. A case study of the Moletele Claim assesses how these partnerships work, and concludes that the benefits to the beneficiary communities are often non-existent.

- According to the model, the DRLDR introduced 'strategic partnerships' on land that was under commercial production but had been successfully claimed through land restitution. Ownership of the land is transferred to the claimant community but they are not allowed to move back onto the land on the promise that they will receive profitable and functioning farms at the termination of the lease agreements. The aim is to ensure transfer of the land back to restitution communities whilst maintaining production regimes on the land acquired, with the laudable aim of integrating rural communities into existing value chains. Restitution claimants enter into agreements with agri-business partners to manage the land on their behalf, with benefits to be shared between the partners. Benefits are seen as: rental for use of the land; a share in profits; preferential employment; training opportunities. Warning against an overly rosy perception of these 'benefits', some scholars warn that these partnerships could lead to new forms of exploitation, given unequal power relations and unequal access to resources and to the authorities between the commercial partner and the community.

- In brief summary, the study concludes that insisting on these strategic partnerships is at best a mixed blessing, with nominal ownership being achieved by the claimant communities but with no real benefits to show for it. In the Moletele case (with partners New Dawn and Dinaledi) some of the outcomes were:

    - employment preference promise did not materialise. Farms were acquired as going concerns, thus kept their own employees. Community members live too far away, transport costs prohibitive.
    - no dividend declared
    - rent paid only intermittently
    - skills transfer did not work: trained employees leave for greener pastures
    - government grants were not paid; both strategic partners and community under financial pressures
    - rise of dissident group campaigning to move back onto the land
    - older members, especially female, asking for cash compensation
    - **The concluding finding is that the lives of the majority of the Moletele have remained the same.**

- A final issue related to the **Community Property Associations Act 28 of 1996** which was passed to enable communities to form juristic persons in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution. The Act assigns some responsibilities to the DRDLR (registration of associations and provisional associations, DG to monitor compliance, etc.). Challenges noted in the implementation of the Act include: weak induction of CPA members; outdated register of CPAs; no pre-settlement support for CPAs; no dedicated capacity by government to implement the Act. The **Communal Property Association Amendment Bill 2016** also displays some problems:

    - it appears to strip CPAs of ownership rights, opting instead to grant powers "to administer and manage" communal land
    - it gives the government ultimate decision-making power over CPA land
    - it abolishes provisional CPAs
    - it distinguishes between "association" and "community"

3. LEGISLATION REFERRED TO IN SUBMISSIONS

SA Constitution; Restitution of Land Rights Act 1994; Restitution of Land Rights Amendment Act 2014; Communal Property Associations Act 28 of 1996; Communal Property Association Amendment Bill 2016; Trust Property Control Act 1988; Expropriation Act 63 of 1975; Property Evaluation Act 17 of 2014; Traditional Leadership and Governance Framework Act 41 of 2003;

4. CONCLUSIONS AND RECOMMENDATIONS

- The focus needs to be on researching outstanding land claims, and for this the Land Commission needs to be provided with more staff, resources and training. These resources should include assistance in filing, and keeping and using databases.
- Historical training should be provided for land claims officials in order to assist them in assessing land claims and historical validity reports. There should also be a drive to involve professional historians in the project of researching land claims. (Researching land claims properly involves the development of regional histories by historians, which can provide a very helpful baseline in researching other claims in that region.)
- This will require funding specifically for research. Basically, all energy needs to go into researching land claims in order to assist the commission in settling claims in as fair a way as possible.

- Unreasonable deadlines – such as the one to settle all outstanding land claims in the next 24 months – are unhelpful and should be extended, dropped or ignored. Research into settling claims is time consuming and cannot be rushed. This is not to suggest that there should not be targets for completion of the process, but targets should be linked to a realistic understanding of the scale of the task and the amount of person power with appropriate skills that will be needed meet the target.

- The legal requirements for restitution need to be respected, particularly the requirement that those eligible for restitution include people who were dispossessed of land after 1913 and that they need to have had 10 years of beneficial occupation of specific land. This is particularly the case when deciding what to do with large tribal claims for former (often imaginary) kingdoms. These claims are divisive and are otherwise problematic in that they are based on a misperception of the role of chiefs in land tenure systems, and the nature of African societies, and conflate the idea of political territory with ownership by a chief.

- The Commission needs to employ or engage stronger legal services. The claims often give rise either to very complicated property transactions or complex litigation that would test the skills of top law firms. Yet people who are not lawyers are dealing with these transactions and cases. When the cases come to court, the services of the State Attorney offices are available to the Commission. But they themselves are often under-skilled and overstretched by a massive case load. There is also an urgent need for legal training within the Commission to sharpen their legal skills.

- There must be greater willingness to entertain cash settlements in settling claims speedily. This could also free up the countryside for the government's programmes of Land Redistribution, which would involve assisting people who are genuinely interested in farming to get land.

- The state must show commitment to strengthening CPAs by reinforcing the Constitutional Court judgement in the ***Bakgatla*** case. The process must seek to realise at least the following outcomes:

    - effective communication strategy between DRDLR and the CPAs to ensure that concerns and needs are attended to and disputes are resolved.

- protection of CPA membership rights to land and other assets so that they are not abused by elites and other forces
- facilitation of community rules that ensure: accountability and transparency; equal benefits and fair redistribution of wealth; protection of marginalised elders, women and children; regulation of different forms of land use and changes and changes to such use (ie, limiting interference by traditional leaders and municipalities)